

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION

UNITED STATES OF AMERICA

*Plaintiff-Appellee*

v.

No. 2:16cr3KS-MTP (S.D. Miss.)  
[C.A. No. 17-60001]

KENNETH E. FAIRLEY

*Defendant-Appellant*

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**AGREED MOTION TO SUPPLEMENT THE RECORD**

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Pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure, the United States of America (“the Government”), the appellee herein, with the consent of counsel for appellant, hereby submits this motion to supplement the record on appeal with the transcripts of tape recordings that were admitted into evidence, and in support thereof would show the following:

1. During the trial of this case, the Court admitted into evidence a series of audio recordings of conversations between Kenneth Fairley, the defendant in this case, and Artie Fletcher, who was originally charged in this case but pled guilty to a superseding information.

2. When the recordings (GX 28, 29, 30 & 31) were admitted into evidence and played for the jury, the Court permitted the jurors to have a transcript of each recording to use as an aid in following the conversation (GX 28A, 29A, 30A & 31A). While these transcripts were admitted for identification only, the availability of the

transcripts would assist the Court of Appeals in its consideration of the audio tape evidence on appeal.

3. Rule 10(e) of the Federal Rules of Appellate Procedure permits the record to be supplemented with items that are “material to either party.” FED. R. APP. P. 10(e). Just as the transcripts served to assist the jury, the transcripts likewise would be of benefit to the Court of Appeals. *See, e.g., United States v. Onori*, 535 F.2d 938, 947 (5th Cir. 1976) (“without the aid of a transcript, it may be difficult to identify the speaker”); *United States v. Valencia*, 957 F.2d 1189, 1194 (5th Cir. 1992) (“There is no question that a transcript of a taped conversation is beneficial to a jury, and is generally used to assist the jury as it listens to the tape in court.”). Because the transcripts were available to the jury, making them available to the Court of Appeals does not add anything that was not already before the jury. *See United States v. Page*, 661 F.2d 1080, 1082 (5th Cir. 1981) (“Rule 10(e) exists to allow the district court to conform the record to what happened, not to what did not.”) (internal quotes and citation omitted). *United States v. Andiarena*, 823 F.2d 673, 677 (1st Cir. 1987) (“The District Court properly supplemented the record by forwarding to this court the 25-page transcript of the nine tape recordings played before the jury.”). In citing the transcripts, the Government intends to make clear they were offered for identification only as an aid to the jury.

5. The undersigned has contacted Herbert V. Larson, Jr., counsel for the appellant, who advised, on behalf of his client, that he does not oppose supplementing the record as described herein.

## CONCLUSION

For the foregoing reasons, the record should be supplemented to include the transcripts of the audio recordings described herein.

Respectfully submitted,

GREGORY K. DAVIS  
*United States Attorney for the  
Southern District of Mississippi*

/s/ *Gaines H. Cleveland*

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Dated: March 8, 2017

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this day, he caused to be electronically filed a copy of the foregoing with the Clerk of the Court using the ECF system, which caused the corrected motion to be served on counsel of record.

CERTIFIED, this the 8th day of March 2017.

/s/ *Gaines H. Cleveland*

GAINES H. CLEVELAND

*Assistant United States Attorney*